

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2011-102

MELISSA JAN WILLIAMSON

APPELLANT

VS.

FINAL ORDER
SUSTAINING HEARING OFFICER'S
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER

LABOR CABINET
LARRY L. ROBERTS, APPOINTING AUTHORITY

APPELLEE

AND

MARK BIZZELL

INTERVENOR

** ** *

The Board at its regular December 2013 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated November 1, 2013, having considered Intervenor's Exceptions to Recommended Order and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be, and they hereby are approved, adopted and incorporated herein by reference as a part of this Order, and the Appellant's appeal is therefore **DISMISSED**.

The parties shall take notice that this Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

SO ORDERED this 18th day of December, 2013.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. LaTasha Buckner
Hon. Oliver H. Barber, Jr.
Hon. Mark Bizzell
Lynn Keeling Gillis
Sherry Butler

**COMMONWEALTH OF KENTUCKY
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**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER**

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This matter came on for an evidentiary hearing before the Personnel Board on Thursday, September 26, 2013, at 9:00 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Stephen T. McMurtry, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

Present were the Appellant, Melissa Jan Williamson, her attorney, the Hon. Oliver H. Barber, Jr., the Intervenor, Mark Bizzell, *pro se*, and the Appellee, Labor Cabinet, represented by the Hon. Gordon Slone.

BACKGROUND

1. On May 4, 2011, David Suetholz, General Counsel for the Kentucky Labor Cabinet, notified the Appellant, Melissa Jan Williamson, that Mark Bizzell, was promoted to the position of Attorney Manager/Assistant General Counsel, a position for which she, Bizzell, and three other attorneys had applied.

2. Williamson appealed this adverse decision to the Kentucky Personnel Board on May 17, 2011, alleging an illegal penalization, age and gender discrimination, and a violation of Section 2 of the Kentucky Constitution. Specifically, she stated:

I have been denied the opportunity to compete for the position of Staff Attorney Manager/Assistant General Counsel for Legal Services within the office of

General Counsel, Labor Cabinet (Position 16759BR) in violation of both statutory and regulatory authority.

Prior to this position becoming available, David Suetholz, Executive Director of the Office of General Counsel, openly indicated that Mark Bizzell, a Staff Attorney III with the Labor Cabinet would be chosen for the position. Before the job was posted (on March 1, 2011) and before interviews were held, Mr. Suetholz again stated that Mr. Bizzell would be chosen for the job because "he needed a raise."

I applied, qualified for, and was placed on the register for the same position. I interviewed for the position on April 27, 2011, and shortly thereafter received a letter from Mr. Suetholz advising me Mr. Bizzell had been chosen for the position. This letter instructed me to contact Mr. Suetholz's secretary to schedule a time to "discuss that decision." A copy of that letter is attached to the appeal.

On Friday, May 6, 2011, I met with Mr. Suetholz. He told me, "Mark is not more qualified than you; that not why I picked him. I picked him because he needs more money." Pursuant to the statutory and regulatory requirements, i.e. the "5 factors" which are to be followed when selecting any individual for a promotion, rate of pay is not a qualifying factor. (See KRS 18A.0751(4)(f) and 101 KAR 1:400). The selection of Mr. Bizzell for this position is also arbitrary and in violation of Section 2 of the Kentucky Constitution.

3. On July 6, 2011, Mark F. Bizzell, the successful applicant for the position of Attorney Manager/Assistant General Counsel, filed a motion to intervene, which motion was granted by Interim Order of July 14, 2011. The applicable statutes in this appeal are KRS 18A.095(12), which reads, "Any classified employee may appeal to the Board in an action alleged to be based on discrimination due to race, color, religion, national origin, sex, disability, or age forty (40) and above, and KRS 18A.0751(4)(f), which reads: "... promotions ... shall give appropriate consideration to the applicant's qualifications, record of performance, conduct, and seniority."

4. **Appellant Melissa Jan Williamson** is a highly-qualified staff attorney with the Kentucky Labor Cabinet, Office of General Counsel. She earned a Master's Degree at Eastern Kentucky University and a Law Degree at Stetson University in Florida. In Florida, she was a Lead Attorney for felony cases in the Fifth Circuit, and managed the office for the Department of Dependent Children, supervising case workers and attorneys. Because of her parents' illnesses, she moved back to Kentucky and was hired as Staff Attorney, her present position. In that position, she has been supervised by David Suetholz, General Counsel, and Dandridge Walton, Deputy General Counsel.

5. Williamson testified that in February 2011, Suetholz advised staff attorneys that Sharon Cooper intended to retire in the Fall of that year. Her retirement created an enviable position for the staff attorneys. The position would be described as Attorney Manager/Assistant

General Counsel. The evidence is not clear that the duties would change, but for Williamson, promotion to that position would be an increase of 10% in her salary.

6. Williamson testified Chip Smith, another attorney in the office, told her on several occasions that Suetholz told him that Bizzell would be appointed to the position formerly held by Sharon Cooper, and that Bizzell needed to make more money. Williamson also testified that Suetholz, after she had not been selected for the position, called her into his office and told her that Bizzell was not more qualified than she. He said Bizzell was promoted because he needed more money. Williamson also pointed to her 2010 performance evaluation from Suetholz, in which he noted she also was not being paid enough for the work done by her for the Labor Cabinet.

7. **Intervenor Mark Bizzell** testified he started his law career as a clerk with the Department of Public Advocacy. He worked as an Assistant Commonwealth Attorney in Owensboro, Kentucky, and moved to an Assistant County Attorney. Leaving that position, he worked in the Attorney General's office and was assigned to Medical Fraud and License Revocation. While his wife was going to optometry school in Indianapolis, he worked for the prosecutor's office there. He moved back to Kentucky when his wife finished school and he began working in the office of the General Counsel for the Labor Cabinet. He noted he had more seniority in state government than Williamson. Bizzell further testified that he was over 40, without children, and his wife was the primary breadwinner in the family. He stated he did not need more money, and never told Suetholz that he did. He noted that one of Williamson's last three job performance evaluations was better than his, as he had two Outstanding and one Highly Effective evaluations while she had three Outstanding evaluations. Bizzell admitted that when personnel advised him he needed more information to be approved to compete for the position of Attorney Manager/Assistant General Counsel, he turned to Suetholz for help, and Suetholz turned in the necessary information to the promotion panel for evaluation.

8. **Susan Draper**, Director of the Division of OSH Compliance, now retired, testified that David Suetholz asked her and she agreed to participate in a promotion panel with him and Dandridge Walton, the Deputy General Counsel of the Labor Cabinet, the panel which promoted Mark Bizzell rather than Williamson. She testified that each candidate provided the panel with a document entitled "Internal Mobility Applicants" which included information about seniority, qualifications (education), performance evaluations, record of performance (awards, accomplishments, the candidate's supervisor's name and recommendations, etc.) and conduct (disciplinary actions). She introduced the documents that compared Bizzell and Williamson, and testified that these two candidates were equal in all respects except Bizzell had more years seniority and Williamson had one better performance evaluation.

9. Draper testified the three panel members brought the completed internal mobility documents into the candidates' interviews conducted on April 27 and 28, 2011. Each candidate answered the same 14 prepared questions, while the panel members graded the quality of the responses; for example, "How would you describe the way you approach cases?" and "How do you give or take correction?" The panelists scored the answers on a grade from 1 to 5, with 5 being the highest.

10. Draper said “they” (referring to the panelists), took the four statutory factors for promotion into account in deciding whom to promote. After the interview, the panel discussed the merits of the candidates and unanimously decided to promote Mark Bizzell with Williamson coming in as the second choice. Draper stated that during the interview, Bizzell was “relaxed, forth-coming and eager to communicate.” Williamson appeared “uninterested,” had an air of defeatism, and was “monotone in her responses.” Bizzell’s interview, according to Draper, was clearly better than Williamson’s and secured for him the promotion.

FINDINGS OF FACT

1. Appellant, Melissa Jan Williamson, is a member of a protected group (women).
2. Williamson was subjected to an adverse employment decision in not being promoted.
3. Williamson was qualified for the position of Attorney Manager/Assistant General Counsel.
4. Bizzell was a non-protected employee who was treated more favorably than Williamson. He was promoted – she wasn’t.
5. The Cabinet proved that it chose a promotion panel consisting of David Suetholz, Dandridge Walton and Susan Draper, who appropriately considered the qualifications, records of performance, conduct and seniority of Bizzell and Williamson. This consideration left the two virtually tied in the panel’s choice for promotion. The tie was broken when Bizzell performed substantially better than Williamson in the interview. There is little or no evidence that the panel acted arbitrarily.
6. Prior to the promotion process, David Suetholz made the statement that Bizzell was going to get the promotion and that he was not promoted over Williamson because he was more qualified, but because he needed more money. Suetholz had also written in Williamson’s performance evaluation for the year 2010 that “she was worth more than the [state] is paying her.”

CONCLUSIONS OF LAW

1. The Hearing Officer concludes as a matter of law that Appellant Melissa Jan Williamson proved a *prima facie* case of gender discrimination when the Labor Cabinet did not promote her to the position of Attorney Manager/Assistant General Counsel.
2. Despite Williamson having proved a case of gender discrimination, the Labor Cabinet provided a “legitimate, non-discriminatory” reason for promoting Mark Bizzell.

Williamson, however, did not show by a preponderance of the evidence, that Bizzell's better performance in the promotion interview was merely a pretext to hide a discriminatory reason for the promotion, a gender-based *animus* against women. Turner v. Pendennis Club, 19 S.W. 3d 117, 120 (Ky. App. 2000). For these reasons the Cabinet did not discriminate against Williamson on the basis of gender in violation of KRS 18A.095(12).

3. The Hearing Officer concludes as a matter of law that Williamson did not prove a prima facie case of age discrimination. Mark Bizzell, as well as Williamson, is a member of a protected class of persons of the age of 40 or above. KRS 18A.095(12). A non-protected employee was not treated more favorably than Williamson. Murray v. Eastern Kentucky University, 328 S.W. 2d, 3d 679, 682 (Ky. App. 2009).

4. Finally, the Hearing Officer concludes as a matter of mixed facts and law that the Labor Cabinet did not violate the mandatory provisions of KRS 18A.0751(4)(f) in promoting Mark Bizzell rather than Williamson to the position of Attorney Manager/Assistant General Counsel.

5. For the above reasons, the Cabinet did not violate Section 2 of the Kentucky Constitution. The panel did not act arbitrarily.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **MELISSA JAN WILLIAMSON V. LABOR CABINET AND INTERVENOR MARK BIZZELL, (APPEAL NO. 2011-102)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are filed by the other party within five (5) days of the date on which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

Any document filed with the Personnel Board shall be served on the opposing party.

The Personnel Board also provides that each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file a Request for Oral Argument with the Personnel Board. 101 KAR 1:365, Section 8(2).

Each party has thirty (30) days after the date the Personnel Board issues a Final Order in which to appeal to the Franklin Circuit Court pursuant to KRS 13B.140 and KRS 18A.100.

ISSUED at the direction of **Hearing Officer Stephen McMurtry** this 15th day of November, 2013.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Gordon Slone
Hon. Oliver H. Barber, Jr.
Hon. Mark Bizzell